

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ABBOTT DIABETES CARE INC.)
And ABBOTT LABORATORIES,)
Plaintiff(s),) No. C05-3117 MJJ (BZ)
v.) Related Cases: 04-2123 MJJ
ROCHE DIAGNOSTICS CORP.,) 04-3327 MJJ
ROCHE DIAGNOSTICS) 04-3732 MJJ
OPERATIONS, INC., and BAYER)
HEALTHCARE LLC,)
Defendant(s).)

)

Before me is a motion by defendants Roche Diagnostics Corp. and Roche Diagnostics Operations, Inc. (collectively "Roche") to compel discovery of a settlement agreement between plaintiff Abbott Laboratories and non-party LifeScan, Inc. Also before me is a motion by Abbott Diabetes Care, Inc. and Abbott Laboratories (collectively "Abbott") to quash a subpoena duces tecum issued by defendant Bayer Healthcare LLC to LifeScan or, in the alternative, to preclude the

1 discovery via a protective order.¹ For the reasons discussed,
 2 Roche's motion is **DENIED**, and Abbott's motion is **GRANTED**. To
 3 the extent they are before me, LifeScan's objections are
 4 sustained consistent with this Order.

5 1. While Abbott waived its relevancy objection to
 6 Roche's discovery request by not raising it in a timely
 7 fashion, Richmark Corp. v. Timber Falling Consultants, 959
 8 F.2d 1468, 1474 (9th Cir. 1992),² it is undisputed that it
 9 properly preserved its confidentiality objection. Moreover,
 10 Abbott properly raised relevancy and confidentiality
 11 arguments in its motion to quash, and LifeScan has objected
 12 on the same grounds.

13 2. LifeScan and Abbott held a legitimate expectation

15 ¹ Federal Rule of Civil Procedure 45(c) allows a party
 16 to file a motion to quash a third-party subpoena so long as
 17 the party demonstrates some right or interest in the documents
 18 requested. See G.K. Las Vegas Ltd. Partnership v. Simon
Property Group, Inc., 2007 WL 119149, at *3 (D. Nev.); In re
Ashworth, Inc. Securities Litigation, 2002 WL 33009225, at *2
 19 (S.D. Cal); see also Moon v. SCP Pool Corp., 232 F.R.D. 633,
 636 (C.D. Cal. 2005) ("A party cannot object to a subpoena
 20 duces tecum served on a nonparty, but rather, must seek a
 protective order or make a motion to quash."). In addition,
 Rule 26(c) provides for the issuance of a protective order
 "[u]pon motion by a party or by the person from whom discovery
 21 is sought, . . . and for good cause shown"

22 ² Abbott mistakenly argues that the following general
 23 objection preserved its relevancy objection: "Abbott objects
 24 to the Interrogatories to the extent that they would require
 25 Abbott to provide information beyond the scope of discovery
 obligations imposed by the Federal Rules of Civil Procedure or
 the Local Rules, including the Patent Local Rules, of this
 Court." See McLeod, Alexander, Powell & Apffel, P.C. v.
Ouarles, 894 F.2d 1482, 1485 (5th Cir. 1990) (boilerplate
 26 objections that requests were overly broad, burdensome,
 oppressive, and irrelevant were insufficient to meet party's
 27 burden); see also E.E.O.C. v. Safeway Store, Inc., 2002 WL
 31947153 (N.D. Cal. 2002) (quoting Walker v. Lakewood
 28 Condominium Owners Association, 186 F.R.D. 584, 587 (C.D. Cal.
 1999)).

1 that their settlement agreement resolving litigation
2 pertaining to Abbott's U.S. Patent No. 5,820,551 (the "'551
3 patent") would remain confidential. The agreement includes a
4 confidentiality provision. Courts may utilize protective
5 orders to protect confidential settlement agreements. See
6 Phillips ex rel. Estates of Byrd v. General Motors Corp., 307
7 F.3d 1206, 1212 (9th Cir. 2002). And, in light of the Federal
8 Circuit's stated policy of encouraging settlement by
9 shielding settlement documents and negotiations from use as
10 evidence at trial, see Advanced Cardiovascular Sys., Inc., v.
11 Medtronic, Inc., 265 F.3d 1294, 1308 (Fed. Cir. 2001), both
12 parties could reasonably presume the agreement would be kept
13 confidential.

14 3. After reviewing the agreement in camera, I conclude
15 that the agreement is not relevant to the parties' claims and
16 defenses. Contrary to defendants' speculation, the agreement
17 contains no discussion of royalty payments or a licensing
18 arrangement. I find the discovery of the agreement, its
19 various drafts, and the related documents is not reasonably
20 calculated to lead to relevant, admissible evidence. Fed. R.
21 Civ. P. 26(b)(1). When I weigh the confidentiality
22 expectation of Abbott and LifeScan and the policy of
23 encouraging settlement against the questionable relevance of

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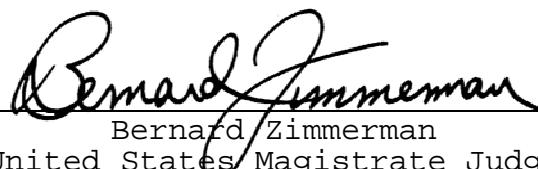
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1 the documents, the scale tips decidedly against disclosure.

2 Dated: August 3, 2007

3 
4 Bernard Zimmerman
United States Magistrate Judge

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